In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1172

THE FIRST NATIONAL BANK OF BOSTON,
NEW ENGLAND MERCHANTS NATIONAL BANK,
THE GILLETTE COMPANY,
DIGITAL EQUIPMENT CORPORATION,
and
WYMAN-GORDON COMPANY,
APPELLANTS,

v.

FRANCIS X. BELLOTTI, ATTORNEY GENERAL,
and
COALITION FOR TAX REFORM, INC.
and UNITED PEOPLES, INC.,
APPELLEES.

On Appeal from the Supreme Judicial Court for the Commonwealth of Massachusetts

JURISDICTIONAL STATEMENT

BINGHAM, DANA & GOULD
100 Federal Street
Boston, Massachusetts 02110
Tel. No. (617) 357-9300
By FRANCIS H. FOX
E. SUSAN GARSH
Attorneys for Appellants

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Opinion Below

The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts (App. A) is reported at Mass. Adv. Sh. (1977) 134, — N.E.2d —.

Jurisdiction

Appellants brought this action in the Single Justice session of the Supreme Judicial Court for the Commonwealth of Massachusetts seeking, *inter alia*, to have declared unconstitutional Massachusetts General Laws c. 55, § 8 ("Section 8") on its face and as applied to plaintiffs insofar as it prohibited plaintiffs from expending or contributing any monies to defeat a proposed constitutional amendment submitted to the voters at the general election on November 2, 1976. The complaint sought relief on the grounds that Section 8 violated the First and Fourteenth Amendments to the United States Constitution.

After the parties entered into a Statement of Agreed Facts (App. F),[1] the case was reserved and reported by the Single Justice to the Full Court without decision. After argument, the Court issued an Order (App. B) on September 22, 1976, denying appellants all relief and on September 28, 1976, judgment was entered (App. C). The opinion of the Court entered February 1, 1977.

Appellants filed a timely notice of appeal with the clerk of the Supreme Judicial Court on September 29, 1976. (App. D). Appellants' motion for a stay or injunction pending appeal was denied by the Supreme Judicial Court on September 30, 1976 (App. E) and by this Court on October 6, 1976. The time for docketing this appeal was extended to February 25, 1977, on December 8, 1976.

The Jurisdiction of this Court is conferred by 28 U.S.C. § 1257(2). *Commonwealth Bank* v. *Griffith*, 39 U.S. 55 (1840).

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[1] Exhibit D to the Statement of Agreed Facts, 65 pages of financial reports filed in a previous election by a previously existing political committee, has been omitted from the Statement, App. F, since such reports are not relevant to this Court's jurisdiction.

Statute Involved

The text of Mass. Gen. Laws c. 55, §8, the validity of which is involved in this action, is set forth below:

> No corporation carrying on the business of a bank, trust, surety, indemnity, safe deposit, insurance, railroad, street railway, telegraph, telephone, gas, electric light, heat, power, canal, aqueduct, or water company, no company having the right to take land by eminent domain or to exercise franchises in public ways, granted by the commonwealth or by any county, city or town, no trustee or trustees owning or holding the majority of the stock of such a corporation, *no business corporation* incorporated under the laws of or doing business in the commonwealth and no officer or agent acting in behalf of any corporation mentioned in this section, *shall directly or indirectly give, pay, expend or contribute, or promise to give, pay, expend or contribute, any money or other valuable thing for the purpose of* aiding, promoting or preventing the nomination or election of any person to public office, or aiding, promoting or antagonizing the interests of any political party, or *influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation. No question submitted to the voters solely concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation.* No person or persons, no political committee, and no person acting under the authority of a political committee, or in its behalf, shall solicit or receive from such corporation or such holders of stock any gift, payment, expenditure, contribution or promise to give, pay, expend or contribute for any such purpose.

Any corporation violating any provision of this section shall be punished by a fine of not more than fifty thousand dollars and any officer, director or agent of the corporation violating any provision thereof or authorizing such violation, or any person who violates or in any way knowingly aids or abets the violation of any provision thereof, shall be punished by a fine of not more than ten thousand dollars or by imprisonment for not more than one year, or both. 6 Mass. Gen. Laws Ann. 50 (pocket part) (emphasis added).

Questions Presented

1. Whether the appeal is moot because the November 2, 1976 election has passed.

2. Whether Section 8, insofar as it forbids a business corporation from contributing or expending any monies to communicate its views in opposition to a ballot question solely concerning taxation of individual income, absent a demonstration by the corporation that the proposed ballot question does, in fact, materially affect its business, property or assets, is invalid as a denial of freedom of speech.

3. Whether the words "materially affecting any of the property, business or assets of the corporation" as used in Section 8 are so vague as to deprive appellants of their liberty or property without due process of law in violation of the Fourteenth Amendment.

4. Whether Section 8 denies appellants equal protection of the law in that:

a. it prohibits corporate expenditures, and thus corporate expression of views, pertaining to an individual income tax ballot question but does not prohibit corporate expenditures pertaining to other ballot questions, thus creating a classification based solely upon the content of the expression;

b. it prohibits business corporations, but not labor unions, partnerships, business trusts or others similarly situated, from expending funds to oppose ballot questions solely concerning individual income taxes.

5. Whether the provision in Section 8, a criminal statute, that no question concerning solely the taxation of individuals "shall be deemed materially to affect" the business of a corporation is an irrebuttable presumption which deprives appellants of liberty or property without due process of law.

Statement of the Case

Appellants are five business corporations (two banks, two scientific/technical concerns, and a business engaged in the development, manufacturing and sale of consumer products and services) who wished to expend monies in opposition to a proposed state constitutional amendment submitted to the voters at the general election on November 2, 1976. The amendment, as it appeared on the ballot, proposed that the Legislature be granted the authority to impose a graduated tax on individual income.[2] The defendant, Attorney General of the Commonwealth, indicated that he would prosecute the appellants pursuant to Section 8 should they expend funds to publicize their views on the proposed amendment to the general public. Appellants then sought declaratory relief.

The Statement of Agreed Facts stipulates that each of the appellants intended to expend monies to publicize their opposition to the proposed constitutional amendment and that the management of appellants believed that the proposed constitutional amendment would affect adversely

[2] At present, the Massachusetts state constitution permits only flat-rate taxation upon individual income. Mass. Const., Amend. Art. 44.

their business and property by discouraging persons of high ranking executive and middle management ability and engineering and technical specialists from settling or remaining in Massachusetts, by tending to reduce the individual savings account balances maintained at the appellant banks, as well as their individual and industrial loan portfolios, by discouraging business from settling or remaining in Massachusetts, and by shrinking the disposable income available for the purchase of consumer products. (App. F, 33-37). It was further stipulated that there is a division of opinion among economists as to whether and to what extent a graduated income tax imposed solely on individuals would affect the business and assets of corporations. (App. F, 33).

Appellants argued below that the outright prohibition against corporate expenditures or contributions relating to an individual income tax ballot question violated their First Amendment right to freedom of expression. The Court responded that only when a general political issue materially affects a corporation's assets may that corporation claim First Amendment protection for its speech entitling it to communicate its position on that issue to the general public (App. A, 13), and that Section 8 was not invalid as to the plaintiffs since they had failed to demonstrate that the proposed amendment does in fact materially affect their business. (App. A, 14).

Appellants also argued that the statute was impermissibly vague. With respect to the words "materially affects" the Court noted that the term is general in nature, but that the prohibition against corporate expenditures on a ballot question solely concerning individual income tax is precise and definite. (App. A, 19).[3]

[3] Appellants also argued that other language in the statute was vague and that Section 8 was overbroad. The Court narrowed the definition of "expenditure" and held that Section 8 does not proscribe communications to shareholders or employees or the publication of views in an in-house newspaper. The overbreadth and vagueness questions, except with respect to the vagueness of the phrase "materially affects", are not raised on appeal.

In response to appellants' contention that Section 8 deprived them of equal protection of the laws, the Court applied the "rational basis" test accorded to economic matters and concluded that business corporations could be treated differently from labor unions because corporations have shareholders, and that they could be treated differently from other business entities with shareholders because the Legislature may have concluded that such entities did not present the same type of problem. (App. A, 22-23).

Finally appellants argued that Section 8 created an impermissible, irrebuttable presumption of fact in a criminal statute concerning the materiality of an individual income tax question upon corporate assets. The Court held that there were two separate crimes in Section 8, one being the general crime of expending funds on questions not materially affecting a corporation's assets and the other being the crime of expending funds on a question dealing solely with individual taxes. With respect to the second crime, the Court held that materiality was not an element of the crime, and, therefore, that the language in Section 8 stating that such questions are not to be deemed material was not a presumption. (App. A, 24).

On November 2, 1976, the proposed constitutional amendment was defeated at the polls. (App. A, 4 n.6).

The Questions Are Substantial

The constitutional questions in this case affect countless business corporations throughout Massachusetts. The fundamental First Amendment rights of these corporations to express their views on political questions which their management believes may materially affect their business, and the fundamental First Amendment rights of the public to hear the views which these corporations wish to express, are affected by the decision below.

I. The Action Is Not Moot

The event precipitating appellants' request for relief—the placement of a proposed constitutional amendment on the November, 1976 ballot—has ended. Nevertheless, under the standards articulated by this Court, the appeal is not moot.

The appeal falls within that class of cases "capable of repetition, yet evading review" which, if not heard after the specific underlying dispute has terminated, will never be able to be reviewed by this Court. *Southern Pacific Terminal* v. *ICC,* 219 U.S. 498, 515 (1911). In *Weinstein* v. *Bradford,* 423 U.S. 147, 149 (1975) (per curiam), the Court set forth, as follows, the two elements which, if found in a case other than a class action, will satisfy the "capable of repetition, yet evading review" doctrine: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." The instant case satisfies both elements.

A. *The Same Controversy Will Recur*

Section 8 imposes an outright ban on all corporate expenditures for the purpose of influencing the vote on questions solely concerning individual taxation. The Supreme Judicial Court has ruled that the provision would be invalid only if a corporation has proven that a proposed individual income tax question does in fact materially affect its business. (App. A, 14). The Court specifically noted that "reasonable belief" that a proposed question would materially affect a corporation is not sufficient. (App. A, 15 n.15). Thus, when appellants renew their challenge to the statutory prohibition before the next election, it necessarily will entail litigation.

The 1976 election marked the fourth time in recent years that a proposed graduated income tax ("GIT") amendment has been submitted to the Massachusetts voters by ballot question. The Massachusetts Constitution requires that any proposed constitutional amendment pass both houses of the Legislature in two consecutive sessions before appearing on the ballot. Mass. Const., Amend. Art. 48, IV §§4, 5. This procedure was followed in the 1962, 1966, 1972, and 1976 elections.[4] Each time the voters rejected the pro-

[4] In a joint session of the two branches held on May 13, 1959, the Legislature approved the proposed amendment to the Massachusetts Constitution which was on the November, 1962 ballot, and which purported to authorize the imposition of a graduated income tax. The proposed amendment received 143 affirmative votes and 118 negative votes. Journal of the Senate 848-51 (1959). It was approved a second time by the Legislature on March 29, 1961, when the proposed amendment received 144 affirmative votes and 121 negative votes. Journal of the Senate 717-20 (1961).

In a joint session of the two branches held on August 30, 1966, the Legislature approved the proposed amendment to the Massachusetts Constitution which was on the November, 1968 ballot, and which purported to authorize the imposition of a graduated income tax. The proposed amendment received 188 affirmative votes and 46 negative votes. Journal of the Senate 1678-81 (1966). It was approved a second time by the Legislature on May 10, 1967, when the proposed amendment received 174 affirmative votes and 78 negatives votes. Journal of the Senate 1121-23 (1967).

In a joint session of the two branches held on July 2, 1969, the Legislature approved the proposed amendment to the Massachusetts Constitution which was on the November, 1972 ballot, and which purported to authorize the imposition of a graduated income tax. The proposed amendment received 204 affirmative votes and 49 negative votes. I Journal of the Senate 1586-90 (1969). It was approved a second time by the Legislature on May 12, 1971, when the proposed amendment received 245 affirmative votes and 20 negative votes. I Journal of the Senate 1290-94 (1971). (App. F, 40-41).

In a joint session of the two branches held on August 15, 1973, the Legislature approved the proposed amendment to the Massachusetts Constitution which was on the November, 1976 ballot, and which purported to authorize the imposition of a graduated income tax. The proposed amendment received 199 affirmative votes and 66 negative votes. II Journal of the Senate 2126-29 (1973). It was approved a second time by the Legislature on May 7, 1975, when the proposed amendment received 228 affirmative votes and 41 negative votes. I Journal of the Senate 1409-12 (1975).

posal, but as note four indicates, the Legislature continues, by lopsided margins, to place the issue on the ballot. Moreover, several politically influential groups have advocated in the past and undoubtedly will continue to press for passage of a GIT. (App. F, 46). In fact, a bill now is pending in the Legislature to enact a GIT. (App. G). It would take effect upon approval by the voters of a constitutional amendment.

Section 8 imposes a continuing statutory obstacle to spending monies in opposition to a GIT ballot question.[5] The Attorney General, whether the present incumbent or a successor, will enforce the statute. State policy "is not contingent upon executive discretion." *Super Tire Engineering Corp.* v. *McCorkle*, 416 U.S. 115, 124 (1974). Unlike the situation in *Spomer* v. *Littleton*, 414 U.S. 514 (1974), appellants are not challenging the behavior of a particular state's attorney. Even in cases, unlike the present one, where there is no statute which effectively precludes discretion, this Court has been willing to assume that the appropriate authorities would apply the law. *E.g., Nebraska Press Ass'n* v. *Stuart*, 96 S.Ct. 2791, 2797 (1976) (case law authorizing prosecutors to seek restrictive orders meant such orders would be sought and thus case not moot).

Finally, there is a reasonable likelihood that the same complaining parties again will be subjected to the same statutory prohibition. All the complaining parties believed

[5] Corporate expenditures and contributions for political matters have been prohibited or restricted since 1907. St. 1907 c. 576, §22. In 1938 corporations were allowed to spend monies as to a ballot question "affecting" the corporate property, business or assets, St. 1938 c. 75, and in 1943 this was revised to require that the question "materially affect" the same. St. 1943 c. 273, §1. Lustwerk v. Lytron, Inc., 344 Mass. 647, 652, 183 N.E.2d 871 (1962). This provision compels a demonstration by the corporation of materiality in fact according to the Court below. (App. A, 13). The tailor-made prohibition against GIT expenditures dates from 1972 (App. A, 6) and now provides that no ballot question solely concerning individual taxation shall be deemed to have such a material effect.

that a graduated individual income tax would materially affect their business and all wished to spend funds to oppose the GIT constitutional amendment in 1976. The very fact that they are seeking plenary review before this Court after the election has passed indicates their continuing purpose to secure the right to expend funds in future elections. Moreover, the record indicates that four of the five appellants contributed funds in 1972 in opposition to the proposed GIT constitutional amendment which appeared on the 1972 ballot. (App. F, 35, 36, 37). It may be inferred that they contributed in earlier GIT campaigns. *See Lustwerk* v. *Lytron, Inc.*, 344 Mass. 647, 183 N.E.2d 871 (1962). Unlike the situations presented in *Weinstein* v. *Bradford, supra*, 423 U.S. at 149 (highly improbable that released convict would once again acquire status of parolee), or *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974) (virtually impossible that final term law school student would once again acquire status of law school applicant), in the instant case there is more than a reasonable probability that the same complaining parties will again believe themselves to be unconstitutionally restricted by Section 8.

B. *The Time Frame Will Preclude Review*

Appellants, in order to avoid "ripeness" problems, may not bring a new action until it is clear that a GIT constitutional amendment will appear on the ballot. *California Bankers Ass'n* v. *Shultz*, 416 U.S. 21, 72-75 (1974); *O'Shea* v. *Littleton*, 414 U.S. 488, 495-98 (1974). Passage twice through both houses of the Legislature is time-consuming, and past experience indicates that the process will not be completed until approximately 18 months prior to the next election. *See* note four, *supra*.

In 1976 appellants presented their case by means of a statement of agreed facts. The opinion below held that the absence of a finding that these corporations would, in fact,

be materially affected by the ballot question was fatal to appellants' constitutional contentions. Since the Attorney General obviously will not stipulate to this material effect (having prevailed in this case on precisely that point), appellants will be faced with proving the material effect at trial. The trial and review process cannot be completed within 18 months.[6]

After a trial on the merits, and the issuance of a written decision, these appellants would face review by the Massachusetts Appeals Court and then the Supreme Judicial Court before an appeal could be taken to this Court. Appellants could under no foreseeable circumstances obtain plenary review before this Court in sufficient time to be able to expend funds in a meaningful fashion in advance of the vote. *E.g., Roe* v. *Wade,* 410 U.S. 113 (1973).

Of course, appellants' contention on the present appeal is that the imposition of such a burdensome course on the exercise of the right to express an economic and political viewpoint is unconstitutional. That issue is presented on the present record. If it is not resolved by this Court now, it will never be resolved.

C. *Election Cases*

This Court, applying the *Southern Pacific Terminal* "capable of repetition, yet evading review" standard,

[6] In Suffolk County, where the instant case originated, the average time from date of entry to trial in Superior Court is 56 months; the average time in all other counties is 43 months. 19 Annual Report to the Justices of the Supreme Judicial Court 64 (June 30, 1975).

The instant case was commenced in the Single Justice session of the Supreme Judicial Court. This process is quite compatible with a relatively expeditious handling of a case upon an agreed statement. Where the prospect is for a hotly contested trial, presumably consuming days or weeks with the testimony of economic experts on whether and to what extent future individual tax rates may impact on corporate business, the case will be processed through the Superior Court, the trial court of the Commonwealth.

has repeatedly sustained its jurisdiction in election cases although the specific election underlying the action has passed. *E.g., American Party* v. *White,* 415 U.S. 767, 770 n.1 (1974); *Rosario* v. *Rockefeller,* 410 U.S. 752, 756 n.5 (1973); *Dunn* v. *Blumstein,* 405 U.S. 330, 333 n.2 (1972); *Moore* v. *Ogilvie,* 394 U.S. 814, 816 (1969).[7] "In these cases [individual challenges to state election laws after the elections had taken place] the Court recognized the importance of the issues to candidates and voters who would participate in future elections and accepted jurisdiction under the *Southern Pacific* rationale without reference to the absence of a formal class action." Note, *The Mootness Doctrine In The Supreme Court,* 88 Harv. L. Rev. 373, 388 (1974).

Guidance on the resolution of the mootness question posed by the instant case may be found in this Court's discussion in *Storer* v. *Brown,* 415 U.S. 724, 737 n.8 (1974) (challenge to state election laws relating to placement of independent candidates on the California ballot):

> The 1972 election is long over, and no effective relief can be provided to the candidates or voters, but this case is not moot, since the issues properly presented, and their effects on independent candidacies, will persist as the California statutes are applied in future elections. This is, therefore, a case where the controversy is "capable of repetition, yet evading review." [Citations omitted.] The "capable of repetition, yet evading review" doctrine, in the context of election cases, is appropriate when there are "as applied" challenges as well as in the more typical case involving

[7] In those election cases in which mootness claims have been sustained, factors other than the mere passing of the election were determinative. Brockington v. Rhodes, 396 U.S. 41, 43 (1969) ("limited nature of the relief [mandamus] sought"); Hall v. Beals, 396 U.S. 45 (1969) (intervening change in state law); Golden v. Zwickler, 394 U.S. 103 (1969) (Congressman, target of anonymous handbills, elected to bench).

Union, Inc.). It has long been established that corporations are "persons" within the meaning of the Fourteenth Amendment, *e.g., Covington & Lexington Turnpike Rd. Co.* v. *Sandford,* 164 U.S. 578, 592 (1896), and there are numerous cases holding that profit-making corporations are entitled to freedom of expression. *E.g., Doran* v. *Salem Inn, Inc.,* 422 U.S. 922 (1975); *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964); *Grosjean* v. *American Press Co.,* 297 U.S. 233, 244 (1936). *Cf. Eastern Ry. Conf.* v. *Noerr Motors,* 365 U.S. 127, 137-39 (1960).

Moreover, this Court has consistently asserted that the right of the listener to hear is at least equally precious as the right to speak. *E.g., Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 756 (1976); *Bigelow* v. *Virginia,* 421 U.S. 809, 822 (1975); *Stanley* v. *Georgia,* 394 U.S. 557, 564 (1969). "Democracy depends on a well-informed electorate, not a citizenry legislatively limited in its ability to discuss and debate candidates and issues." *Buckley* v. *Valeo, supra,* 424 U.S. at 49 n.55. Since the voters' ability to hear the views of corporations is "inextricably meshed" with the appellants' right to speak, the appellants may assert those rights on behalf of the voters. *Procunier* v. *Martinez,* 416 U.S. 396, 409 (1974). *See also Madison* v. *Wisconsin Employment Relations Comm'n,* 97 S.Ct. 421, 426 n.7 (1976). The decision of the court below does not respond to appellants' contention that the public's right to know necessarily is suppressed by the drastic limits in Section 8 imposed on a corporation's ability to communicate.[8] Since the voters'

[8] Perhaps the argument was ignored because the Massachusetts Court assumed that corporations could communicate effectively without expending money. (App. A. 17). This assumption is directly contrary to this Court's premise that "virtually every means of communicating ideas in today's mass society requires the expenditure of money." Buckley v. Valeo, 424 U.S. 1, 19 (1976).

only facial attacks. The construction of the statute, an understanding of its operation, and possible constitutional limits on its application, will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated before an election is held.

Appellants submit that under the principles articulated in *Storer,* this action is not moot. At the very least, the mootness question itself is sufficiently substantial to warrant fuller consideration in briefs on the merits.

II. Section 8 Violates First Amendment Rights Afforded Appellants by Virtue of the Fourteenth Amendment

A state criminal statute prohibiting all contributions or expenditures on one political question absent proof by the corporate speaker of the material effect of that question on its assets operates as a prior restraint upon freedom of expression and comes to this court "bearing a heavy burden against its constitutional validity." *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58, 70 (1963). Two courts recently have invalidated on First Amendment grounds restrictions on corporate expenditures or contributions relating to ballot questions. *C & C Plywood Corp.* v. *Hanson,* 420 F. Supp. 1254 (D. Mont. 1976), *appeal docketed,* No. 76-3118, 9th Cir., September 29, 1976; *Pacific Gas & Electric Co.* v. *Berkeley,* 60 Cal. App. 3d 123, 131 Cal. Rptr. 350 (1976).

There is no doubt that Section 8, which prohibits all contributions or expenditures by corporations on any political question relating to individual taxation, could not survive a constitutional challenge if it were extended to individuals or non-profit corporations. *Buckley* v. *Valeo,* 424 U.S. 1 (1976) (prevailing parties included incorporated political groups such as the New York Civil Liberties

right to be well-informed is paramount, the distinction between corporations and individuals as the source of speech is constitutionally irrelevant.

The Court below recognized that Section 8 " 'operate[s] in an area of the most fundamental First Amendment activities' ". (App. A, 10). With respect to appellants' First Amendment claims, it held as follows:

> [W]e hold today that only when a general political issue materially affects a corporation's business, property or assets may that corporation claim First Amendment protection for its speech or other activities entitling it to communicate its position on that issue to the general public. (App. A, 13).
>
> . . .
>
> The statutory prohibition can only be invalid as to the plaintiffs if they have demonstrated that the proposed amendment does in fact materially affect their business. The plaintiffs have not made such a showing. (App. A, 14).

The Court applied a limit upon corporate freedom of expression—proof that the subject matter is material to the speaker—hitherto unrecognized by any case law.

A. *The Holding Below That Appellants Must Affirmatively Prove Materiality Before Acquiring First Amendment Protection Has No Support in the Decisions of This Court*

The Statement of Agreed Facts specifies that the management of each of the appellants believed that the corporations' interests would be affected materially[9] by the pro-

[9] The agreed facts clearly reveal that this belief is reasonable. For example, appellant banks have literally billions of dollars on loan to, and in deposits from, both individuals and corporations and the appellants' combined payroll comprises over 20,000 employees covering all income levels. (App. F, 32-37). The tax climate in the State would seem to be a matter for their reasonable concern. The Court held that a reasonable belief as to materiality would not suffice, however. (App. A, 15 n.15).

posed constitutional amendment, and that economists disagree as to the impact of a graduated individual income tax upon corporations. (App. F, 33). Whether or not appellants' prediction is sound, whether or not their views are as worthy as those of the proponents of the tax—such questions are not relevant in a constitutional republic. By requiring appellants to demonstrate materiality in fact, particularly in view of the criminal sanctions attached to violation of the statute,[10] Section 8 operates as a prior restraint upon freedom of expression. *Cf. United States* v. *CIO*, 335 U.S. 106, 153 (1948) (Rutledge, J., concurring). Appellants are aware of no decision requiring proof of a direct financial interest in the topic of speech as a prerequisite to speech. The proposition that only corporations engaged in the business of communicating may speak without first demonstrating materiality sets media corporations on a pedestal not recognized by the First Amendment. *E.g., Branzburg* v. *Hayes*, 408 U.S. 665, 684 (1972) ("[T]he First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."); *Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367, 390 (1968) ("It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."); *Time, Inc.* v. *Hill*, 385 U.S. 374, 389 (1967) ("Those guarantees are not for the benefit of the press so much as for the benefit of all of us."). After this Court's decision in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, supra*, there can be no doubt

[10] If a corporation is criminally prosecuted under Section 8 for spending money in opposition to the proposed constitutional amendment, the prosecution need not prove lack of materiality in order to secure a conviction. (App. A, 24).

that the right to hear and the correlative right to speak extend to corporate commercial advertisements. The decision in *Virginia State Board* leaves no room for a state statute to prohibit drug price advertising merely because an advertising pharmacy has failed to prove at trial that the advertisement will actually result in greater sales.

Conditioning the right to speak upon a demonstration of factual materiality impermissibly burdens freedom of expression. Moreover, in the context of this case, the burden is almost impossible to satisfy, and thus operates as a total prohibition. The materiality of an amendment authorizing, but not requiring, graduated individual income taxation, is dependent upon unknown and essentially unknowable future legislative tax enactments. What the graduated rate may be ten or fifteen years hence is impossible to know but would be relevant as to the future impact on the corporate community. Indeed, the Attorney General admitted that materiality could not be proven:

> This Court would have to engage in pure speculation as to the type of tax, the gradation and the extent of the tax that would be imposed before it could determine whether it would more likely than not have a material effect.[11]

Furthermore, even if the issue were capable of judicial resolution, a finding as to materiality most likely could not be made within the relatively short time span between knowledge that a proposed constitutional amendment will appear on the ballot and the election itself. The necessity to engage in costly litigation when a corporation reasonably believes its business to be materially affected is an undue burden upon its First Amendment rights. "[E]ven when pursuing a legitimate interest, a State may not choose

[11] Brief of the Defendant, p. 66.

means that unnecessarily restrict constitutionally protected liberty." *Kusper* v. *Pontikes,* 414 U.S. 51, 58-59 (1973). "Inhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government." *Lamont* v. *Postmaster General,* 381 U.S. 301, 309 (1965) (Brennan, J., concurring) (Requirement that an addressee notify the Post Office of his desire to receive mail unconstitutional because almost certain to have a deterrent effect). *See also Cantwell* v. *Connecticut,* 310 U.S. 296, 307 (1940) (Statute prohibiting solicitation for religious or charitable purpose absent determination by secretary of public welfare that cause is religious or charitable constitutes an unconstitutional restraint, "a forbidden burden upon the exercise of liberty protected by the Constitution.")

B. *The Total Prohibition On Corporate Expenditures or Contributions Relating to Any Ballot Question Solely Concerning Individual Taxation Serves No Compelling or Rational State Interest*

Despite the holding that a corporation would have First Amendment protection for its speech were its business materially affected, the Court below declined to examine whether the governmental interests advanced by the State could satisfy the "exacting scrutiny applicable to limitations on core First Amendment rights of political expression." *Buckley, supra,* 424 U.S. at 44-45. Instead it held as follows: "We cannot say that there was no rational basis for this legislative determination [that no question concerning taxation of individuals shall be deemed materially to affect corporate assets]." (App. A, 14) (emphasis added).[12]

[12] The nature of the "rational basis" is not indicated in the opinion.

Incidental restrictions upon the exercise of First Amendment rights may be imposed in furtherance of a legitimate governmental interest unrelated to suppression of free expression if the restriction is no greater than necessary to further that interest. *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968). Section 8 is not merely an incidental restriction. Its sole effect is to restrict or prohibit communication. The governmental interest advanced below, namely preventing corporations from "drowning out" the voices of the proponents of the proposed constitutional amendment, is aimed precisely at suppression of free expression. "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . ." *Buckley, supra,* 424 U.S. at 48-49. *See also, Madison* v. *Wisconsin Employment Relations Comm'n, supra,* 97 S.Ct. at 426. Moreover, unlike contributions to candidates, informational corporate messages relating to ballot questions cannot corrupt the electoral process. *Schwartz* v. *Romnes*, 495 F.2d 844, 851 (2d Cir. 1974).

Section 8 bars corporate communications to the public as to the wisdom of a GIT but does not bar lobbying—communications to legislators—as to a GIT after the constitution is amended to allow a GIT to be passed. Furthermore, while forbidding communications to the public the statute, as interpreted below, it would not forbid communications with shareholders or employees. Section 8 allows unlimited corporate expenditure as to some ballot questions but completely forbids communications as to other questions. The statute may thus be seen as differentiating among speakers based upon the form of their organization (corporate versus partnership, union, etc.), the identity of their audience, and the content of the communication itself for no intelligible, much less compelling, governmental purpose.

Section 8 cannot be justified on the grounds that the Legislature may determine what is *ultra vires.* The right of corporations to communicate stems from the Fourteenth Amendment. While the state may regulate the affairs of a corporation, it may not impose unconstitutional conditions. *Terral* v. *Burke Construction Co.*, 257 U.S. 529 (1922). *Cf. Craig v. Boren*, 97 S.Ct. 451 (1976) (state's broad power under the Twenty-First Amendment to regulate alcohol cannot justify gender-based discrimination). Moreover, the Attorney General conceded that the state's interest was not in preventing corporate waste, but in "protecting shareholders whose political, as opposed to business interests, may be in direct conflict with the political position of the corporation."[13] Finally, the total prohibition against both contributions and expenditures is not the least restrictive alternative.[14]

In view of the impermissible nature of the governmental interests advanced and the burden imposed upon appellants' freedom of expression, substantial federal questions are raised.[15]

III. The Phrase "Materially Affecting" Fails To Meet the Required Standard of Definiteness

Appellants argued below that the term "materially affecting" was unduly vague and that the uncertainty of having to demonstrate materiality would have a chilling effect upon the exercise of their First Amendment rights. The Court responded as follows:

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[13] Defendant's brief, pp. 74-75.

[14] The Court below noted this Court's distinction in Buckley between contributions and expenditures, but concluded, with little explanation, that "it does not appear to be a relevant one", (App. A, 10 n.11) presumably on the assumption that only corporations which prove material effect have a constitutional right to make either.

[15] No independent state ground appears in the Court's opinion.

> We recognize that the "materially affects" limitation is general in nature; but we also note that the statutory proscription in question here—the prohibition against corporate expenditures on a referendum question *solely* concerning a personal GIT—is both precise and definite. (App. A, 19).

Where appellants attacked the statutory proviso that a personal GIT ballot question "shall not be deemed" materially to affect corporate assets, the Court held that if appellants had proved that the ballot question did "materially affect" their assets the proviso would "be invalid as to the plaintiffs." (App. A, 14). Yet where appellants attacked the "materially affecting" standard itself as being unconstitutionally vague, the Court held that the standard was saved from vagueness by the statutory proviso.

Due process requires that a penal statute not employ terms "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally* v. *General Construction Co.*, 296 U.S. 385, 391 (1926). Where, as here, economists disagree among themselves as to the particular question, it is hard to conceive how the standard would be clear to "men of common intelligence." Furthermore, the "general test of vagueness applies with particular force in review of laws dealing with speech." *Hynes* v. *Oradell*, 425 U.S. 610, 620 (1976). In the instant case the vagueness of the legislative standard has had a substantial deterrent effect in that the appellants felt effectively muzzled despite their reasonable belief that their interests were materially affected by the proposed constitutional amendment.

IV. The Section 8 Prohibition Is Invalid as an Unconstitutional Denial of Equal Protection of the Laws

Because the statutory classification affects First Amendment rights, strict scrutiny is required. *Police Dept.* v. *Mosley*, 408 U.S. 92, 99 (1972) (anti-picketing ordinance which exempted peaceful labor picketing held invalid under Equal Protection clause). A statute affecting fundamental rights is judged by "the stricter standard of whether it promotes a *compelling* state interest," *Shapiro* v. *Thompson*, 394 U.S. 618, 638 (1969), and it will not be afforded the usual presumption of constitutionality. *See, e.g., Kramer* v. *Union Free School District*, 395 U.S. 621, 628 (1969). The Court below recognized that the statute operated in "'an area of the most fundamental First Amendment activities'" (App. A, 10), but because it found the statute was not actually prohibited by the First Amendment it reverted to "traditional scrutiny involving economic matters" when reviewing Section 8 for equal protection purposes. (App. A, 22). The Court did not apply strict scrutiny nor did it find a compelling state interest.[16]

The Court thus misconceived its task. Application of these equal protection principles is not dependent upon a finding that the challenged statute is unconstitutional under the First Amendment. *See Young* v. *American Mini-Theatres, Inc.*, 96 S.Ct. 2440 (1976). Indeed, if a statute is found unconstitutional on First Amendment grounds there is no reason to consider the merits of equal protection attacks. The proper frame of reference is whether or not the

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[16] The opinion may reflect an incipient trend on the part of the Supreme Judicial Court. *See* Commonwealth v. 707 Main Corp., Mass. Adv. Sh. (1976) 2643, 2649-51, 357 N.E.2d 753 (since the particular movie is obscene and not entitled to First Amendment protection Court applies "rational basis" test to defendant's equal protection argument).

statute operates in an area of fundamental rights. If it does, the classifications embodied in the statute must serve a compelling interest.

The statutory proviso, forbidding corporations from communicating as to ballot questions relating to individual taxes but not forbidding communications as to other questions, discriminates impermissibly on the basis of the content of speech, as does Section 8 in its broader aspect, by forbidding communications as to ballot questions which do not "materially affect" the corporation but not limiting communications as to ballot questions which do "materially affect" them. *See Mosley, supra.* Whatever may be the scope of permissible content-based regulation, *see Young* v. *American Mini-Theatres, Inc., supra,* no decision of this Court justifies regulating political speech topic by topic.

Appellants also argued that the statute must fail because of its under-inclusive nature. The court justified the statute's failure to encompass labor unions, business trusts, partnerships, and other such entities, on three grounds: 1) Legislative desire to protect shareholders against *ultra vires* activities; 2) the Legislature may have concluded that other entities did not present the same type of problem; and 3) ability of the Legislature to proceed one step at a time. (App. A, 22-23). The last two arguments were advanced only with respect to those non-corporate entities which also have shareholders, such as real estate investment trusts.[17]

The *ultra vires* rationale is hard to follow. Section 8, as construed, prohibits corporate expenditures or contributions for matters which management reasonably believes will materially affect the corporation. Forbidding all commentary to the public yet allowing unlimited commentary to legislators is irrational. Furthermore, as far as *ultra vires* questions are concerned, the fact that unions lack shareholders is not a rational explanation for failing to include them in the same statutory scheme that regulates corporate political expenditures in view of this Court's recognition, in *Cort* v. *Ash,* 422 U.S. 66, 81 n.13 (1975), that union members may need *greater* protection against potential misuse of funds.

[17] There are 7500 real estate trusts in Massachusetts. (App. F. 40).

With respect to the other two legislative interests cited by the Court, those pertaining to other business entities with shareholders, the justifications are even weaker. What the "type of problem" is that might have been peculiar to corporations was not identified, but presumably the Court was referring to the "undue influence" argument made by the Attorney General. This Court has rejected the propriety of a governmental interest in balancing voter exposure to political debate. *Buckley* v. *Valeo, supra,* 424 U.S. at 44-45. Nor can the ability to proceed "one step at a time" justify an otherwise irrational classification, particularly since the statute has addressed such questions since 1907. Other than an impermissible interest in attempting to secure approval of the proposed constitutional amendment, there is no substantial relationship between the classification and the object of the legislation. *F. S. Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415 (1920). Furthermore, the Legislature failed to utilize less restrictive alternatives to achieve any permissible goals. *McLaughlin* v. *Florida,* 379 U.S. 184, 196 (1964). Clearly it has demonstrated no state interest sufficiently "compelling" to survive strict scrutiny.

V. Section 8 Incorporates an Irrebutable Presumption of Fact Concerning the Materiality of Ballot Questions Solely Concerning Individual Taxation Which Is Unreasonable and Violative of Due Process.

Before the 1972-1973 amendments, Section 8 provided that no business corporation could spend money to influence the vote on any question other than one materially affecting its assets. To obtain a criminal conviction the prosecutor would have to prove non-materiality. The amendment challenged by appellants provides that no question solely concerning individual taxation "shall be deemed materially to affect" a corporation's assets. The Court below concluded that there was no presumption, not because the prosecutor still would be required to prove non-materiality, but because materiality is not an element of the "separate crime" of spending on a question solely concerning individual taxation. (App. A, 24 n. 19). Nevertheless the statute clearly creates one crime and makes materiality an essential element of that crime. Since the Court below itself held that a prohibition against spending as to the proposed amendment would be unconstitutional if appellants were affected materially, its holding that the prosecutor need not prove non-materiality accomplishes, at the most, nothing more than turning an unconstitutional irrebuttable presumption into an unconstitutional rebuttable presumption. Where the statute imposes criminal penalties, the State must bear the burden of proving guilt. *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975); *Tot* v. *United States*, 319 U.S. 463 (1943). The irrational presumption in Section 8, a criminal statute which impinges upon First Amendment freedoms, should be struck down as a violation of the Due Process clause.

Conclusion

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,

Francis H. Fox
E. Susan Garsh
Bingham, Dana & Gould
100 Federal Street
Boston, Massachusetts 02110
Tel. No. (617) 357-9300
Attorneys for Appellants